BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICARDO VASQUEZ	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 206,442 & 206,443
GENERAL MOTORS CORPORATION	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the November 8, 1999 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on May 17, 2000.

APPEARANCES

James R. Shetlar of Overland Park, Kansas, appeared for claimant. Jair E. Mayhall of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Docket #206,442 is a claim for an October 13, 1994 accident and resulting injuries to the low back and left knee. Docket #206,443 is a claim for a May 15, 1995 accident and resulting injuries to the right ankle.

Imputing a post-injury wage of $320, the Judge averaged a 58 percent wage loss and a 37.5 percent task loss and determined claimant had a 47.75 percent permanent partial general disability. Subtracting five percent for preexisting impairment in claimant's back and seven percent for preexisting obesity, the Judge awarded claimant benefits based upon a 32.75 percent permanent partial general disability. The Judge did not enter separate awards for each accident.

Claimant contends Judge Foerschler erred by (1) imputing a post-injury wage rather than finding a 100 percent wage loss, (2) failing to find that claimant was permanently and totally disabled, and (3) reducing the award by 15 percent for a five percent preexisting functional impairment due to claimant's back and for a seven percent preexisting functional impairment for obesity.

Conversely, respondent contends that Judge Foerschler erred by failing to limit claimant's award to two scheduled injuries. Respondent argues that claimant sustained a left knee injury only in the October 1994 accident and a right ankle injury in the May 1995 accident. It also argues that any award should be reduced by 50 percent due to claimant's obesity and that a credit should be given as claimant is receiving both Social Security disability benefits and disability benefits from respondent. In the alternative, respondent argues that the award should be affirmed.

The issues before the Appeals Board on this review are:

1. What is the nature and extent of injury and disability arising from the October 13, 1994 accident?

2. What is the nature and extent of injury and disability arising from the May 15, 1995 accident?

3. If claimant is entitled to permanent partial general disability benefits, should a post-injury wage be imputed for the permanent partial general disability formula and in what amount?

4. If claimant is entitled to permanent partial general disability benefits, what is claimant's task loss?

5. Should the award be reduced for preexisting impairment to claimant's back or for preexisting obesity?

6. Should claimant's award be reduced because of the disability benefits that he receives?

FINDINGS OF FACT

After considering the entire record, the Appeals Board finds:

1. Claimant injured his back and left knee on October 13, 1994, while working for respondent. At the time of the accident, claimant was installing taillights to cars on respondent's assembly line. Claimant stepped backwards and fell approximately 30 inches onto a concrete floor.

2. The October 1994 accident permanently injured claimant's left knee and low back. According to the July 26, 1995 office notes of orthopedic surgeon Gerald R. McNamara, M.D., one of claimant's treating physicians for the low back and left knee injuries, claimant might benefit from back surgery. The doctor wrote, in part:

> The patient returns. He [claimant] has minimal improvement with his fourth epidural steroid injection and at this point has no significant limited job descriptions.
>
> The patient is a large, obese male, with mechanical type back pain and myelogram does show some impingement of the nerve roots, though it does not appear to be consistent with a herniated nucleus pulposis [sic]. In addition, he also has significant problems with right [sic] knee where he had anterior cruciate ligament reconstruction which appears to have failed with quite a bit of instability.
>
> X-RAYS: X-rays show significant degenerative joint disease. Because of the patient's large size and young age, I do not feel he is a candidate for total knee replacement at this time.
>
> At this point, I feel that it would be very difficult to get him [claimant] back to his present job description due to his multiple complaints. He certainly might get some improvement with back surgery, but it would need to involve decompression, laminectomy with internal fixation which was [is] not done here at our office.

According to the January 15, 1999 report prepared by Dr. Larry F. Glaser, whom respondent selected to evaluate claimant, claimant needs a total left knee replacement. The doctor wrote, in part:

> He [claimant] basically needs a total knee replacement on his left knee. I see absolutely no reason to do an MRI of his left knee to rule out a torn meniscus. Even if he had a torn meniscus he would basically need a total knee replacement. However, because of his morbid obesity I personally would not be willing to undertake a total knee replacement on him. I think it would be fraught with practical intra-operative problems because of his obesity and the high risk associated with his new-diagnosed diabetes.

3. As a result of the October 1994 accident, claimant has a 10 percent whole body functional impairment for the back and a 10 percent whole body functional impairment for the left knee injury. Those ratings were provided by Dr. Daniel D. Zimmerman, who evaluated claimant at the request of claimant's attorney. Dr. Zimmerman was the only physician who provided an opinion of claimant's functional impairment using the revised

third edition of the AMA *Guides to the Evaluation of Permanent Impairment* (the *Guides*). The Board is mindful that both Doctors McNamara and Glaser provided opinions of claimant's functional impairment, but their ratings were based upon the fourth edition of the *Guides*, if any.

4. After the October 1994 accident, claimant returned to work for respondent for approximately one week and helped install windshields. Although claimant experienced considerable difficulty performing that job, claimant did it until he injured his right ankle on May 15, 1995.

5. Since May 15, 1995, claimant has not worked anywhere. Because claimant could not complete a work hardening program, claimant was unable to return to his duties on respondent's assembly line. Claimant asked respondent for a fork lift job, but respondent advised claimant that he did not have enough seniority to obtain that position. Because claimant does not want to jeopardize the disability benefits that he now receives from both Social Security and respondent, he has not sought work with other employers.

6. Considering claimant's testimony, coupled with the various doctors' testimonies about claimant's abilities, the Appeals Board finds that claimant could not return to work for respondent and perform assembly line work because of the left knee and low back injuries. But considering that same evidence, including claimant's statements that he now tolerates sitting and that he believes he could operate a fork lift, the Board concludes that claimant retains the ability to perform sedentary work.

7. Based upon the ability to perform sedentary-type work, claimant retains the ability to earn approximately $8 per hour or $320 per week. That finding is based upon the opinions of both claimant's and respondent's vocational rehabilitation experts, Michael J. Dreiling and Gary Weimholt.

8. Based upon Dr. Zimmerman's testimony, the Board finds that claimant has sustained a 100 percent task loss as a direct result of the October 1994 accident. The Board is mindful that Dr. Glaser provided opinions regarding claimant's task loss. But the Board finds those opinions are entitled little weight as Dr. Glaser's task loss opinions were based upon other doctors' restrictions rather than his own. Dr. McNamara testified but he was not asked to provide a task loss opinion. For those reasons, the Appeals Board finds Dr. Zimmerman's task loss opinion to be more persuasive.

9. Immediately before the October 1994 accident, claimant did not have an actual or ratable functional impairment to either his low back or left knee. Claimant's testimony is uncontroverted that before October 1994 he was not having any problems or symptoms from either his back or left knee. After recuperating from a back injury that he sustained in the early 1990s, claimant returned to his regular assembly line work and performed arduous labor. The Appeals Board concludes that claimant recovered from that back

injury. Claimant's testimony that he did not experience any left knee problems before the October 1994 accident is also uncontroverted and credible.

10. Claimant injured his right ankle on May 15, 1995, when he stepped off a curb and fell while walking into respondent's plant. That accident caused permanent injury to claimant's right ankle.

11. As a result of the right ankle injury, claimant has sustained an eight percent functional impairment to the right lower leg. That finding is based upon the opinion and rating of Dr. Zimmerman, who diagnosed right ankle tendinitis. The Board is mindful that Dr. McNamara diagnosed a lateral ankle sprain and rated the ankle at five percent. But only Dr. Zimmerman used the revised third edition of the AMA *Guides.* Further, Dr. McNamara did not use the criteria set forth in the *Guides* in formulating his rating as he relied upon his personal opinions and experience.

CONCLUSIONS OF LAW

1. The Award should be modified to (1) increase the permanent partial general disability to 79 percent in docket #206,442 and (2) award claimant benefits for an eight percent functional impairment to the right lower leg in docket #206,443.

2. Claimant's October 13, 1994 accident arose out of and in the course of employment.

3. For an October 1994 accident, the Workers Compensation Act provided that permanent partial general disability benefits would be determined by averaging the wage loss with the task loss when a worker's post-injury wage dropped below 90 percent of the pre-injury average weekly wage. The Act further provided that the permanent partial general disability rating should not drop below the functional impairment rating, which was required to be determined by using the revised third edition of the *Guides.* The appropriate version of the Act reads:

> . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. **In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third**

> **edition, revised, of the American Medical Association Guidelines [Guides] for [to] the Evaluation of Physical [Permanent] Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .[1] (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon the ability to earn wages rather than the actual post-injury wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

4. As indicated in the findings above, claimant has the ability to perform sedentary-type jobs. But claimant is not looking for work and, therefore, he has failed to make a good faith effort to find appropriate employment. Therefore, for purposes of the permanent partial general disability formula, the Appeals Board imputes a post-injury wage of $8 per hour, or $320 per week. Comparing the stipulated pre-injury average weekly wage of $758 to the post-injury wage of $320, the Board concludes that claimant has a 58 percent wage loss for that prong of the disability formula.

5. Averaging the 100 percent task loss with the 58 percent difference in wages, the Board concludes that claimant has a 79 percent permanent partial general disability for the October 1994 accident.

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[1] K.S.A. 44-510e(a).

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Copeland*, p. 320.

6. Because claimant injured his back while working for respondent in the early 1990s, respondent requests that any award be reduced by an amount for preexisting functional impairment to the back. The Workers Compensation Act reads:

> . . . The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[5]

Respondent's request for a reduction based upon an alleged preexisting back problem should be denied. First, the evidence fails to establish that claimant had a preexisting back condition that constituted an impairment. Conversely, claimant's testimony established that his back was asymptomatic and that he was able to perform arduous labor and lift very heavy weights. Further, the January 7, 1994 document from an Ohio workers compensation proceeding indicates that claimant was granted an eight percent permanent partial disability that was based, at least in part, upon non-medical disability factors. Therefore, that document fails to establish what claimant's functional impairment would have been, if any, before the October 1994 accident.

Second, the October 1, 1993 medical report from Dr. Frank J. Melidona and the January 5, 1994 report from Dr. Brian S. Gordon, which respondent tried to enter into the record and to which claimant timely objected, are not admissible and, therefore, cannot be considered. Neither Dr. Melidona nor Dr. Gordon testified in this proceeding. Because the doctors did not testify, neither their reports nor the functional impairment ratings contained in those reports can be considered as proof of the alleged preexisting functional impairment. The Act provides:

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.[6]

Considering the entire evidentiary record, the Appeals Board concludes that the record fails to prove the extent of preexisting functional impairment, according to the revised third edition of the AMA *Guides*, that claimant may have experienced before the

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[5] K.S.A. 44-501(c).

[6] K.S.A. 44-519.

October 1994 accident due to a back condition. Therefore, respondent's request that the award be reduced for preexisting functional impairment in the back should be denied.

7. Because Dr. Glaser testified that claimant's obesity contributed to the chronic complaints of back pain and the osteoarthritic changes in the left knee, respondent requests that claimant's award of benefits should be reduced by either seven percent or 50 percent for preexisting impairment. That request should be denied.

First, the Appeals Board concludes that before the October 1994 accident claimant's obesity did not constitute a ratable functional impairment. Claimant was able to work and perform very heavy strenuous labor before the October 1994 accident without any apparent limitations caused by his weight. The mere fact that an individual is overweight does not establish that he or she is impaired.[7]

Although claimant's obesity may have contributed to the degenerative processes that existed in claimant's back and left knee, that fact does not establish claimant had an actual, ratable impairment before the October 1994 accident. The Appeals Board construes K.S.A. 44-501(c) to require proof that a ratable, functional impairment preexisted the work-related accident. It is not required that the functional impairment was rated before the work-related accident occurred or that the individual was given formal medical restrictions. But it is required that the condition actually constituted an impairment as it somehow caused a loss to the worker's physiological capabilities. That is the definition of functional impairment as contained in K.S.A. 44-510e. The fact that a preexisting condition may contribute to the ultimate functional impairment does not necessarily mean that the preexisting condition caused a physiological loss or constituted a ratable impairment according to either the AMA *Guides* or other criteria should the *Guides* not be applicable.

Second, because claimant is not being awarded benefits for his obesity, deducting an amount for a preexisting impairment due to obesity is not proper. Because claimant's permanent partial general disability is based solely on the low back and left knee injuries, the question of preexisting impairment should be limited to those parts of the body. But Dr. Glaser's testimony falls short of proving the physiological loss that existed in the low back and left knee before the October 1994 accident.

Third, Dr. Glaser did not rate claimant's obesity but stated that the obesity contributed to his chronic complaints of back pain and the osteoarthritic changes in the left knee. In his January 15, 1999 letter to respondent's counsel, the doctor wrote, in part:

> I think this patient's [claimant's] morbid obesity is a significant factor in this patient's two diagnoses. This obesity contributes to, and is part of, his chronic complaints of back pain in addition to progression of degenerative

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[7] See *Aycox v. National Carriers, Inc.*, 21 Kan. App. 2d 665, 905 P.2d 1082 (1995).

> osteoarthritic changes of his left knee. Therefore, I would consider one-half of his impairment of his low back, and one-half of his impairment of his left knee as being attributed to his body size and not specifically to a work-related incident or process. Using this reasoning, I would attribute 7% of his impairment to his pre-existent obesity, and 6% impairment to his work-related matters.
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> The Appeals Board concludes that the award should not be reduced for obesity.

8. The evidence falls short of proving that claimant had a preexisting impairment in the left knee. The Appeals Board concludes that claimant did not have any preexisting functional impairment to the left knee, which was asymptomatic before the October 1994 accident. As stated above, evidence that a condition may contribute to an impairment is not evidence that the preexisting condition comprises a physiological loss. Therefore, the award for the October 1994 accident should not be reduced for preexisting left knee functional impairment.

9. Claimant's May 15, 1995 accident arose out of and in the course of employment with respondent.

10. As a direct result of the May 1995 accident claimant has sustained an eight percent functional impairment to the right leg at the ankle level. That conclusion is based upon Dr. Zimmerman's opinion, which is the only opinion in the record based upon the appropriate edition of the *Guides*, the revised third edition.

11. The Workers Compensation Act provides that a worker is entitled to a maximum of 190 weeks of permanent partial disability benefits for a lower leg injury.[8] As provided by regulation,[9] the number of weeks of temporary total disability benefits that are due (one)[10] is subtracted from 190 and the resulting number is then multiplied by the functional impairment rating (eight percent). That computation yields 15.12 weeks of permanent partial disability compensation that claimant is entitled to receive for the May 1995 accident.

12. Because claimant is receiving both Social Security disability benefits and a disability benefit from respondent, the company requests a credit or reduction in the weekly benefits it must pay claimant for his work-related injuries. The Appeals Board disagrees.

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[8] K.S.A. 44-510d(a)(15).

[9] K.A.R. 51-7-8.

[10] Regular Hearing, May 18, 1999; p. 7.

The Workers Compensation Act provides that a worker's benefits may be reduced when that worker begins receiving retirement benefits. The Act reads:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.[11]

But the Supreme Court and Court of Appeals have held that disability benefits are not retirement benefits contemplated by the above statute. In *Wishon*,[12] the Kansas Supreme Court specifically stated that Kansas has not made workers compensation benefits subject to offset by Social Security disability payments, as have other states. The *Wishon* Court approvingly cited *Green*[13] in which the Kansas Court of Appeals ruled that disability benefits from an employer's benefit plan did not constitute retirement benefits for purposes of the K.S.A. 44-501(h) offset. Therefore, because claimant is receiving disability benefits instead of retirement benefits, respondent's request for a credit for those disability benefits must be denied. Further, regarding the disability benefits being paid by respondent, the record fails to establish the amount of benefits attributable to respondent's contributions, which would be necessary before any credit could be computed if it were applicable.

AWARD

WHEREFORE, the Appeals Board modifies the November 8, 1999 Award. In docket #206,442, the Board increases the permanent partial general disability to 79 percent. In docket #206,443, the Board awards claimant benefits for an eight percent functional impairment to the right lower leg.

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[11] K.S.A. 44-501(h).

[12] *Wishon v. Cossman*, 268 Kan. 99, 108, 991 P.2d 415 (1999).

[13] *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P.2d 283, *rev. denied* __ Kan. __ (1999).

Docket No. 206,442

Ricardo Vasquez is granted compensation from General Motors Corporation for an October 13, 1994 accident and resulting disability. Based upon an average weekly wage of $758, Mr. Vasquez is entitled to receive 52.71 weeks of temporary total disability benefits at $319 per week, or $16,814.49, and 260.77 weeks of permanent partial general disability benefits at $319 per week, or $83,185.51, for a 79 percent permanent partial general disability, making a total award of $100,000.00.

As of May 25, 2000, there would be due and owing to Mr. Vasquez 52.71 weeks of temporary total disability compensation at $319 per week, or $16,814.49, plus 240.29 weeks of permanent partial disability compensation at $319 per week, or $76,652.51, for a total due and owing of $93,467.00, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $6,533.00 shall be paid at $319 per week until further order of the Director.

Docket No. 206,443

Ricardo Vasquez is granted compensation from General Motors Corporation for a May 15, 1995 accident and resulting disability. Based upon an average weekly wage of $758, Mr. Vasquez is entitled to receive one week of temporary total disability benefits at $319 per week, or $319, and 15.12 weeks of permanent partial disability benefits at $319 per week, or $4,823.28, for an eight percent permanent partial disability, making a total award of $5,142.28.

As of May 25, 2000, there would be due and owing to Mr. Vasquez one week of temporary total disability compensation at $319 per week, or $319, plus 15.12 weeks of permanent partial disability compensation at $319 per week, or $4,823.28, for a total due and owing of $5,142.28, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Shetlar, Overland Park, KS
Jair E. Mayhall, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director